01-99007

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DONALD J. BEARDSLEE, Petitioner-Appellant, **v.** **JILL BROWN, Warden,** Respondent-Appellee.	**CAPITAL CASE**

On Appeal from the United States District Court
for the Northern District of California
No. C 92-3990 SBA
The Honorable Saundra Brown Armstrong, Judge

RESPONSE TO PETITION FOR REHEARING AND REHEARING EN BANC

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General

DANE R. GILLETTE
Senior Assistant Attorney General
State Bar No. 65925

455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5866
Fax: (415) 703-1234

Attorneys for Respondent-Appellee

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In *Beardslee v. Woodford*, 358 F.3d 560 (9th Cir. 2004), the Court filed an amended opinion affirming the denial of habeas corpus relief with respect to Beardslee's convictions for two first degree murders and judgment of death. There was no request for a vote on whether to hear the matter en banc. The Supreme Court denied Beardslee's petition for writ of certiorari, *Beardslee v. Brown*, 125 S.Ct. 281 (2004), and subsequent petition for rehearing. *Beardslee v. Brown*, 125 S.Ct. 647 (2004).

On December 8, 2004, the Court granted a temporary stay of its mandate to determine whether it should grant an expanded certificate of appealability (COA) based on the decision in *Sanders v. Woodford*, 373 F.3d 1054 (9th Cir.

2004), a decision issued during the pendency of Beardslee's petition for writ of certiorari. Following oral argument the Court issued an expanded COA on December 16, and ordered supplemental briefing. *Beardslee v. Brown*, ___ F.3d ___, 2004 WL 2965969 (9th Cir. 2004). The Court heard argument on the merits December 28, and on December 29 issued a supplemental opinion rejecting Beardslee's argument and again affirming the district court's judgment denying relief. *Beardslee v. Brown*, ___ F.3d ___, 2004 WL 3019188 (9th Cir. 2004). On December 30 the Court issued an order setting a deadline of noon on January 5, 2005, to file a petition for rehearing and rehearing en banc, with any response due by noon on January 6. Beardslee now seeks rehearing and rehearing en banc. The request should be denied.

Petitions for rehearing serve the limited purpose of ensuring that the panel properly considered all relevant information in rendering its decision. FRAP, rule 40; *Armster v. United States District Court*, 806 F.2d 1347, 1356 (9th Cir. 1986). To obtain rehearing Beardslee must demonstrate points of law or fact in the opinion which the Court overlooked or misapprehended. *Id.* He does neither. Rather, Beardslee essentially reiterates the arguments rejected by the Court in its supplemental opinion. His complaint that the Court failed to evaluate the impact of the penalty phase instructions relating to the witness-killing special

circumstance, Pet. at 6-15, simply takes issue with the Court's harmless error analysis. The Court's prejudice discussion, however, is premised entirely on the assumption the jury considered the vacated special circumstances. Slip opn. at 16-25. The Court's opinion reflects the panel's thorough familiarity with the facts of Beardslee's case and the decision in *Sanders*.

Beardslee also suggests that rehearing is necessary to permit the Court to consider cumulative prejudice. Pet. at 22. The Court is clearly familiar with the facts and legal arguments relevant to the case and expressly rejected a claim of cumulative prejudice in its earlier opinion. *Beardslee v. Woodford*, 358 F.3d at 591. As demonstrated by the supplemental opinion, no further analysis is required.[1/] Rehearing should be denied.

Rehearing en banc is generally disfavored and will only be granted when necessary to secure or maintain uniformity of decision or when the proceeding involves a question of exceptional importance. FRAP, rule 35(a); *Atonio v. Wards*

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1. Beardslee seeks to bolster this argument by alleging that two other alleged errors "should have been factored into a cumulative prejudice analysis." Pet. at 22, n. 13. One of the identified claims—alleged ineffective assistance of trial counsel for failing to call Frank Rutherford as a witness—was excluded from the original order granting a COA. The second claim—alleged error under *People v. Davenport*, 41 Cal.3d 247, 221 Cal.Rptr. 794 (1985)—was excluded from the original COA and the panel subsequently denied a motion filed after briefing was completed to expand the COA to include it. Beardslee's belated effort to smuggle uncertified issues into the appeal should not be tolerated.

Cove Packing Co., Inc., 810 F.2d 1477, 1478-1479 (9th Cir. 1987) (en banc). Although generally intended to resolve an irreconcilable conflict between panel decisions, *id.* at 1478, rehearing en banc may be appropriate when a panel opinion "directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity . . . ." Circuit Rule 35-1. En banc review will be rejected where allegedly conflicting opinions can be distinguished. *Atonio*, at 1478-1479; *see also United States v. Zolin*, 842 F.2d 1135, 1136 (9th Cir. 1988) (en banc order vacated as improvidently granted because no conflict existed between panel decisions). None of the grounds warranting en banc review are present in this case.

In *Sanders*, the case upon which Beardslee relied to seek relief, the Court reversed a death penalty judgment because the California Supreme Court vacated two of four special circumstance findings but failed to conduct the type of harmless error analysis mandated by the Supreme Court in *Stringer v. Black*, 503 U.S. 222 (1992) and *Clemons v. Mississippi*, 494 U.S. 738 (1990). After conducting an independent analysis the court found that Sanders was entitled to relief because the jury's consideration of the vacated special circumstances had a substantial and injurious effect on the verdict. *Sanders*, 373 F.3d at 1067-1068

(citing *Brecht v. Abrahamson*, 507 U.S. 619, 638 (1993)). Beardslee argues in reliance on *Sanders* that he was prejudiced by the jury's consideration in his case of an excess multiple-murder special circumstance and two witness-killing special circumstances vacated by the state supreme court on appeal.

In its supplemental opinion the Court found that *Sanders* was binding circuit authority, the application of which to Beardslee's case was not precluded by the retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989). Slip opn. at 13-16. As in *Sanders*, the state court had conducted a constitutionally-deficient harmless analysis in Beardslee's case. *Id.* at 9-13. But the Court also recognized that such error did "not automatically entitle Beardslee to federal habeas relief." Rather, the Court was required to determine whether he was prejudiced within the meaning of *Brecht*. *Id.* at 16. The remainder of the Court's opinion, *id.* at 17-25, contains a detailed examination of the facts in Beardslee's case in light of the *Sanders* error. Because the Court was "not left with grave doubt about whether the jury's consideration of the invalid special circumstances had a substantial and injurious effect on the jury's verdict," *id.* at 24, it denied relief. In short, the Court faithfully applied familiar circuit authority to a different set of facts.

Because *Sanders* held that relief may be granted only if the petitioner were prejudiced by jury consideration of vacated special circumstances, any

subsequent cases to which it is applied will necessarily turn on the facts and circumstances unique to those cases. To be sure, some violations of *Sanders* will warrant relief, while others will not; such, however, is inherent whenever the harmless error test, as opposed to a rule of reversal per se, is applied. Displeased by that realization, Beardslee now suggests that rehearing is necessary to decide whether the reasonable doubt standard of *Chapman v. California*, 386 U.S. 18 (1967) rather than the standard of *Brecht* should apply when the state court is found to have conducted an inadequate harmless error review.Pet. at 4-6. His suggestion should be rejected for at least two reasons.

First, Beardslee expressly sought application of the *Brecht* standard in this case. Argument I.C of his opening brief on Claim 39 stated: "The failure of the California Supreme Court to reweigh or conduct harmless error analysis requires federal review under *Brecht v. Abrahamson*." AOB at 9. Beardslee identified the "standard controlling" the Court's harmless error review to be the one set forth in *Brecht*. *Id.* Second, this Court has expressly held that *Brecht* "should apply uniformly in all federal habeas corpus cases under § 2254," irrespective of whether the state court conducted its own analysis. *Bains v. Cambra*, 204 F.3d 964, 977 (9th Cir. 2000). Capital cases are no exception. *Morales v. Woodford*, 388 F.3d 1159, 1171 & n. 40 (9th Cir. 2004) (reviewing

error in instructions on special circumstances). Beardslee's petition offers no reason to revisit these holdings.

Beardslee fails to demonstrate that the Court in this case misunderstood or misapplied either *Sanders* or *Brecht*, nor does he pose a question of exceptional importance warranting en banc review. He simply wants another opportunity to demonstrate prejudice. "The function of en banc hearing is not to review alleged errors for the benefit of losing litigants." *United States v. Rosciano*, 490 F.2d 173, 174 (7th Cir. 1974).

CONCLUSION

For the reasons stated above respondent respectfully submits that the petition for rehearing and rehearing en banc should be denied.

Dated: January 5, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

RONALD S. MATTHIAS
Supervising Deputy Attorney General

DANE R. GILLETTE
Senior Assistant Attorney General

Attorneys for Respondent-Appellee

CERTIFICATE OF COMPLIANCE
PURSUANT TO CIRCUIT RULES 35-4 AND 40-1

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing enbanc/answer is: (check applicable option)

__X__ Proportionately spaced, has a typeface of 14 points or more and contains 1412 words (petitions and answers must not exceed 4,200 words).

or

___ Monospaced, has 10.5 or fewer characters per inch and contains _____ words or _____ lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

or

____ In compliance with Fed.R.App.P. 32(c) and does not exceed 15 pages.

Dated: January 5, 2005

Respectfully submitted,

BILL LOCKYER
Attorney General of the State of California

DANE R. GILLETTE
Senior Assistant Attorney General

Attorneys for Respondent-Appellee

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **DONALD J. BEARDSLEE v. JILL BROWN, Warden** No.: **01-99007**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On January 5, 2005, I served the attached

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by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, California 94102-7004, addressed as follows:

Michael Lawrence
Habeas Corpus Resource Center
50 Fremont St., Suite 1800
San Francisco, CA 94105

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on January 5, 2005, at San Francisco, California.

PEARL LIM
Declarant

Signature